No. 11500

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA WESTERN STATES LIFE INSURANCE COMPANY, a corporation, *Appellant*,

vs.

CAROLYN H. VAUGHN, a widow and JOHN ALFRED VAUGHN, and JOAN MARILYN, VAUGHN, by their guardian ad litem, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF OF APPELLANTS

KAHIN & CARMODY,
Attorneys for Appellant.
835 Central Building,
Seattle 4, Washington.

JOE S. PEARSON,
Of Counsel.

THE ARGUS PRESS, SEATTLE

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Kahin & Carmody,
Attorneys for Appellant.
835 Central Building,
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Joe S. Pearson,
Of Counsel.

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INTRODUCTION

Appellant's opening brief presents the following major points which are supported by the arguments and citations therein set forth:

I. Under the evidence, was not Vaughn guilty of fraud as a matter of law?

II. Was the existence of good health on Vaughn's part, on and after August 23, 1945, a condition precedent to a binding contract under the policy provisions (Pltf's. Ex. 1b, R. 155).

III. Were the issues tendered by appellant's second amended complaint and appellees' second amended answer properly submitted to the jury?

Appellee seeks to answer these points in her brief and this reply brief is, accordingly, directed to the discussion by appellee of the points listed above.

Certain statements by appellee in her "Statement of the Case" are discussed in the light of the actual record under point I above.

Appellee's argument respecting the propriety of appellant instituting this action is met under point III above.

I.

Under the undisputed evidence, the deceased was guilty of fraud as a matter of law.

Certain of the statements made by appellee's counsel in his brief require re-examination in the light of the record.

He points to the difficulty experienced by appellant's representative in selling the policy (p. 1 of brief). Here are the facts. The company's salesman, W. Guy Hubbard, had called on Vaughn for ten years. Vaughn had never seemed interested before (R. 178). On the occasion of the last call he was seen for an hour and a half or two hours (R. 179).

Hubbard testified on cross-examination (R. 182):

> "Q. Did you have some difficulty in persuading him to purchase the policy?

A. No, not particularly. I don't think so. It was just a matter—

Q. Why was the—

MR. KAHIN: Just a moment.

THE COURT: You interrupted him. He didn't finish the answer.

MR. COOPER: I beg your pardon.

THE COURT: Finish your answer.

THE WITNESS: It was more a matter of explanation rather than convincing the man that he wanted it. I think he agreed that he would buy some, but it was the time that it takes for the description of the policy."

Supporting these statements, Mr. Henry Damski, the company's manager for Western Washington testified as follows (R. 277, 295)

"Q. Did he tell you whether or not it had been difficult to get the application or not? Answer that 'Yes' or 'No'?

A. Yes.

Q. He did tell you that? I mean, he did discuss that with you?

A. Yes.

Q. By Mr. Kahin: Mr. Damski, you say there was a telephone conversation regarding this case?

A. The usual routine. When any of our policy holders pass away, the agent calls me or tells me, and I wire the home office. That's all there was to that.

Q. That was all?

A. Yes, that is the first time I heard of the *Vaughn* case.

Q. Now, I am alluding to a conversation pertaining to the selling of this policy?

A. Yes, sir.

Q. As to whether or not it was difficult to get the application, if Mr. Hubbard made any such statements to you, and I am asking you to relate exactly what they are, as nearly as you can remember.

A. I remember them very definitely.

Q. Will you relate them?

A. Mr. Hubbard told me that he had tried to sell Mr. Vaughn at least once a year for many years, I think he mentioned ten years, and he never could write him the insurance policy, but Mr. Hubbard said that this evening he was very easy to write, and if you will allow me to use the vernacular of insurance men, I will quote exactly what Mr. Hubbard said, your Honor, and that was—

MR. COOPER: Just a moment. I object as not responsive to the question.

THE WITNESS: I am going to say exactly what Mr. Hubbard told me.

THE COURT: You had better ask another question. I am not answering the witness.

Q. By Mr. Kahin: Exactly what did Mr. Hubbard tell you?

A. He said, 'He was a push-over that night'."

One other factor bears importantly upon the deceased's desire to secure coverage at this particular time. He paid cold cash for the first premium— *and well he might knowing that at the very moment he must prepare for a major operation.*

In appellee's statement (p. 2 of brief), the *apparent* good health of the deceased is stressed, presumably as an argument attesting to his good faith in signing the application.

If Vaughn was not suffering pain, why did he consult Dr. Durant on four different occasions? If there was nothing wrong with him why did Dr. Durant advise surgery?

The answers to these questions determine Vaughn's state of mind when he gave false answers to Dr. Tuohy. *He knowingly and intentionally withheld facts known only to him which had he disclosed would have made him uninsurable at that time.*

Dr. Durant himself settles the matter of Vaughn's own appreciation of his condition when he states (concerning the September 18th examination): "As I recollect, he was conscious there was something the matter."

Obviously ignoring Vaughn's visit to Dr. Durant on September 18th, appellee's counsel dwells at length on Dr. Tuohy's examination (page 3 and 4 of brief), stating that: "Even though he would have known that the deceased had consulted Dr. Durant, and knew what Dr. Durant knew, that he would have passed the deceased as an insurable risk."

The record does not bear out this statement. In the first place it was not Dr. Tuohy's job to accept or reject the applicant. This function was lodged entirely with the company (R. 188). Secondly, had Dr. Tuohy been given the information which Vaughn withheld, he testified he "would have put on the paper the history

of that. I would have passed him, and left that up to the company as to whether or not to pass him or not" (R. 143).

The reason he did not put it down was because Vaughn failed to disclose it to him (R. 144). Had such a state of facts been furnished to appellant, it would not have accepted the application (R.192).

Vaughn completely disregarded the truth when he answered: "he was never sick" for one cannot truthfully say he was never sick who had so recently consulted a doctor three or four times due to repeated attacks of what he believed to be appendicitus. Certainly a person suffering recurring attacks of pain in the abdomen or discomforts in that area can hardly be said to be well. That is the reason he consulted Dr. Durant. *It was the motivating reason for his application for a policy of insurance on September 18th.*

As he did at the trial of this cause in the District Court, appellee's counsel grounds his entire case on *Houston v. New York Life Insurance Company*, 166 Wash. 611, 8 P.(2d) 434. Under counsel's interpretation of this case there could be no such thing as fraud as a matter of law.

Obviously, the *Houston* case does not, nor could it, lay down such a ruling. In that case, the Washington court held the question under *those facts* to be one for the jury. That is the limit of the decision as counsel for appellee himself recognizes at page 12 of his brief, where he states that in the *Houston* case the evidence was not sufficient to warrant the court in holding as a matter of law that the deceased had made false statements with intent to deceive.

Both earlier and later Washington cases recognize however, that where the facts of dishonesty are such that reasonable minds cannot differ the question is to be decided by the court as a matter of law. These cases which appellee vainly seeks to distinguish from the facts in the present case are cited in appellant's opening brief.

We earnestly submit that the facts in this case justify and make mandatory the application of the rule. We believe a brief review of the facts will show this and at the same time distinguish Vaughn's situation from the one which confronted the Washington court in the *Houston* case (*supra*).

Vaughn had consulted a doctor, not once and over a short period of ten days, but on four occasions over a period of five months. In each instance he made the same complaint, received the same diagnosis and was advised that surgery was necessary. Further, and this fact is not present in the *Houston* case, Vaughn was given a choice of two doctors to make the examination for life insurance—his family physician who knew all about him and a stranger who could know only what Vaughn saw fit to tell him. *He chose the latter.*

He was asked certain questions concerning his health and in answers stated: (a) that he was in good health; (b) that he had not consulted a physician within five years; (c) that he had never been advised to have any surgical operation; (d) that he had never had any stomach disease or injury (Appellant's Exhibit 1a, R. 141, 142).

We submit that there is a point beyond which the statute here contended for (Rem. Rev. Stat., Sec. 7078—Appellee's brief, p. 10) cannot be stretched. The Washington court states the law unequivocably in *McCann v. Reeder*, 178 Wash. 126, 34 P.(2d) 461:

> "We now come to the main question. Rem. Rev. Stat., Sec. 7078, insofar as it is material here, reads as follows:
>
> " 'No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive.'
>
> "Under our decisions construing this statute, the beneficiary's right to recover upon the policy is not defeated or avoided merely because the representations are false. It must also be found that they were made with intent to deceive. *Houston v. New York Life Ins. Co.*, 159 Wash. 162, 292 Pac. 445, and cases therein cited. The effect of the rule as prescribed by the statute is that the intent of the one making the misrepresentation or warranty is ordinarily a question of fact. If there be a conflict in the evidence touching that question, it is to be resolved by the trier of the fact; *if, however, there be no conflict in the evidence, or if, from the evidence, only one conclusion can properly be reached, it must be determined as a matter of law.*
>
> "Applying this rule to the present case, we are of the opinion that the evidence here presents no conflict, and that the question of intent is to be determined as a matter of law. * * *" (Italics ours)

Appellee makes the point (p. 13 of brief) that since the assured is not present to testify there is, in effect, some kind of a presumption as to his not intending to deceive appellant. This is not correct under the Washington cases which state the rule as follows:

> "The proof of the making of false and fraudulent representations raises a presumption of dishonest motive, which must be overcome by evidence establishing an honest motive." *Day v. St. Paul Fire and Marine Insurance Co.*, 111 Wash. 49, 189 Pac. 95, as quoted in *Great Northern Life Insurance Company v. Johnson*, 187 Wash. 347, 60 P.(2d) 109.

See, also: *Equitable Life Insurance Company v. Carver*, 17 F. Supp. 23 (D.C.W.D.W., 1936); *Quinn v. Mutual Life Insurance Company*, 91 Wash. 543, 158 Pac. 82.

Further, the rule should not be so far extended as to include a case where insurance would not be procurable if the truth were told. *Great Northern Life Insurance Company v. Johnson* (*supra*).

The conclusion is inescapable as to intention to deceive for the evidence is uncontroverted and its extent and force is such as to require a finding of fraud as a matter of law.

II.

Good health was a condition precedent to contract.

Appellant's position is not as appellee's counsel would have the court believe, a matter of the interpretation of the policy provisions (plaintiff's Exhibit

1b) respecting the date when the policy became effective.

It is appellant's contention that this provision. taken from a common sense point of view, is clear and unambiguous, leaving no room for interpretation. Considering the matter from this standpoint, the provision in question says in effect, that if the premium is cash, delivery is not essential to a binding contract. There is no mention in the proviso eliminating good health—delivery is the only condition eliminated from the mutual agreements preceding the proviso clause. One of these mutual agreements is that the assured be in good health when the first premium is paid Since he was not there was no contract.

According to appellee, a binding contract would exist irrespective of the insured's physical condition. Let us test her position by assuming that Vaughn had made the disclosures which common honesty required. According to the evidence, Dr. Tuohy would have reported these facts to the company. The company would have refused the application.

Appellee's contention, if followed, gives the insurer no chance to avoid a contract on any grounds once a premium is paid. Authorities are not required to demonstrate the unsound basis, morally and contractually, of such a position.

III.

The District Court erred in trying the equitable issues before a jury.

Appellee again makes the point that the question of jury trial is governed by the law of the State of

Washington. This question is completely answered by the cases cited in appellee's own brief and those previously cited in appellant's brief. The question is procedural and governed by the law of the forum, not by the laws of the State of Washington.

Appellee seeks to avoid the impact of the Federal decisions on this point by basing her argument on the fact that appellant saw fit to commence the action within two and one-half months after Vaughn's death.

Mr. Justice Cardozo, speaking for the court in *American Insurance Company v. Stewart*, 300 U.S. 203, 47 S. Ct. 377, 81 L. ed. 605, supplies the answer and reason justifying appellant's action:

> "The argument is made, however, that the insurer, even if privileged to sue in equity, should not have gone there quite *so quickly*. Six months and ten days had gone by since the policies were issued. There would be nearly a year and a half more before the bar would become absolute. But *how long* was the insurer to wait before assuming the offensive, and *how was it to know where the beneficiaries would be* if it omitted to strike quickly? Often a family breaks up and changes its abode after the going of its head. The like might happen to this family. To say that the insurer shall keep watch of the coming and going of the survivors is to charge it with a heavy burden. The task would be hard enough if beneficiaries were always honest. The possibility of bad faith, perhaps concealed and hardly provable, accentuates the difficulty * * *." (Italics ours)

Appellee's contention as to the appropriateness of jury trial if stripped of legal verbiage is that she

should not be deprived of a jury trial so far as concerns her cross-complaint.

We submit that such a contention begs the question put by appellant in this appeal.

We have already demonstrated that appellant was within its right in commencing its action. *American Insurance Company v. Stewart* (*supra*). *Enloe v. New York Life Insurance Company*, 293 U.S. 379, 79 L. ed. 440, cited by appellee, is not controlling for the reason that there the incontestability clause did not render action by the insurer necessary in order to protect itself.

The direct question put to this court is whether or not appellant, having commenced an action in equity for cancellation, is to be deprived of a well established remedy, trial of the issues by the court, because a cross-complaint, seeking recovery on the policy, is interposed.

It is our position, supported by what we believe to be the weight of federal decisions, that equitable jurisdiction existing, as it did here at the filing of the bill, is not destroyed because an adequate remedy of law may have become available thereafter. *Lincoln National Life Insurance Company v. Hammer*, 41 F. (2d) 12, 16; *New York Life Insurance Company v. Seymour* (C.C.A. 6) 45 F.(2d) 47; further that equity having once acquired jurisdiction will retain it until complete justice is done between the parties. *American Life Insurance Company v. Stewart* (*supra*); *MacGowen v. Parish*, 237 U.S. 285, 296, 35 S. Ct. 543, 59 L. ed. 955, 963; *Alexander v. Hill-*

man, 296 U.S. 222, 242, 46 S. Ct. 204, 80 L. ed. 192, 201.

In short, we contend that appellant's right to a trial of the equitable issues framed by its complaint and by appellee's answer is just as sacred as appellee's right to a trial by jury. *Brown v. Kalamazoo Circuit Judge*, 42 N.W. 827.

We submit that the District Court erred in requiring appellant to present its case to a jury.

CONCLUSION

We again respectfully submit:

First: The deceased was guilty of fraud as a matter of law and the Circuit Court should set aside the judgment granted to appellee and decree cancellation of the policy.

Second: No contract between the parties in fact existed—the ostensible one represented by the policy should be cancelled.

Third: In the alternative, and only in the event the relief above requested is not granted, a new trial should be granted for the reasons stated in appellant's opening brief and herein.

Respectfully submitted,

KAHIN & CARMODY,
Attorneys for Appellant.

JOE S. PEARSON,
Of Counsel.